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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 AMERICAN NATIONAL PROPERTY AND
8 CASUALTY CO.,

9 Plaintiff(s),

10 v.

11 ANATOLY MAKAROWSKI, et al.,

12 Defendant(s).

Case No. 2:19-CV-1163 JCM (NJK)

ORDER

13
14 Presently before the court is defendant Owen Simmons's ("Simmons") motion to dismiss.
15 (ECF No. 7). Plaintiff American National Property and Casualty Co ("plaintiff") filed a response
16 (ECF No. 10), to which Simmons did not reply.

17 **I. Background**

18 The instant action arises from a car accident between defendant and plaintiff's insured.
19 (ECF No. 1). Plaintiff insures Margot Flores-Eberhart's 2004 Chevrolet Malibu. *Id.* The
20 insurance policy covers Ms. Flores-Eberhart, as well as people using the insured car within the
21 scope of her permission. *Id.* Anatoly Makarowski took Ms. Flores-Eberhart's Chevrolet,
22 allegedly without permission, and was involved in a car accident with defendant and Beverly
23 Diane Wooten-Roberson. *Id.* Wooten-Roberson had one passenger, Charles Hill. *Id.*

24 Simmons, Wooten-Roberson, and Hill filed bodily injury claims as a result of the
25 accident. *Id.* Plaintiff investigated the facts of the case and concluded that there was no
26 coverage under the policy because Makarowski took the car without permission. *Id.* However,
27 Simmons, Hill, and Wooten-Roberson filed negligence actions in the Eighth Judicial District
28

1 Court. *See Owen Simmons v. Anatoly Makarowski*, case no. A-18-783794-C; *Charles Hill, et al.*
2 *v. Anatoly Marakowski, et al.*, case no. A-19-791124-C.

3 Plaintiff filed the instant action seeking a declaration of its obligations—or, rather, the
4 lack thereof—under the policy as a result of the accident.

5 **II. Legal Standard**

6 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*,
7 437 U.S. 365, 374 (1978). “A federal court is presumed to lack jurisdiction in a particular case
8 unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of Colville*
9 *Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, federal subject matter jurisdiction must
10 exist at the time an action is commenced. *Mallard Auto. Grp., Ltd. v. United States*, 343 F.
11 Supp. 2d 949, 952 (D. Nev. 2004).

12 Federal Rule of Civil Procedure 12(b)(1) allows defendants to seek dismissal of a claim
13 or action for a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Dismissal under Rule
14 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face
15 sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory*
16 *(DRAM) Antitrust Litig.*, 546 F.3d 981, 984–85 (9th Cir. 2008).

17 Although the defendant is the moving party in a 12(b)(1) motion to dismiss, the plaintiff
18 is the party invoking the court’s jurisdiction. As a result, the plaintiff bears the burden of
19 proving that the case is properly in federal court to survive the motion. *McCauley v. Ford Motor*
20 *Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298
21 U.S. 178, 189 (1936)). More specifically, the plaintiff’s pleadings must show “the existence of
22 whatever is essential to federal jurisdiction, and, if [plaintiff] does not do so, the court, on having
23 the defect called to its attention or on discovering the same, must dismiss the case, unless the
24 defect be corrected by amendment.” *Smith v. McCullough*, 270 U.S. 456, 459 (1926).

25 In moving to dismiss under Rule 12(b)(1), the challenging party may either make a
26 “facial attack,” confining the inquiry to challenges in the complaint, or a “factual attack”
27 challenging subject matter on a factual basis. *Savage v. Glendale Union High Sch.*, 343 F.3d
28 1036, 1039 n.2 (9th Cir. 2003). For a facial attack, the court assumes the truthfulness of the

1 allegations, as in a motion to dismiss under Rule 12(b)(6). *Trentacosta v. Frontier Pac. Aircraft*
2 *Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). By contrast, when presented as a factual
3 challenge, a Rule 12(b)(1) motion can be supported by affidavits or other evidence outside of the
4 pleadings. *United States v. LSL Biotechs.*, 379 F.3d 672, 700 n.14 (9th Cir. 2004) (citing *St.*
5 *Clair v. City of Chicago*, 880 F.2d 199, 201 (9th Cir. 1989)).

6 **III. Discussion**

7 The Declaratory Judgment Act “gave the federal courts competence to make a declaration
8 of rights; it did not impose a duty to do so.” *Public Affairs Associates v. Rickover*, 369 U.S. 111,
9 112, (1962). The Declaratory Judgment Act provides, in relevant part, as follows:

10 In a case of actual controversy within its jurisdiction, . . . any court
11 of the United States, upon the filing of an appropriate pleading,
12 may declare the rights and other legal relations of any interested
13 party seeking such declaration, whether or not further relief is or
such.
14

15 28 U.S.C. § 2201(a). Thus, by the plain terms of the act, the court “must first inquire whether
16 there is an actual case or controversy within its jurisdiction.” *Principal Life Ins. Co. v. Robinson*,
17 394 F.3d 665, 669 (9th Cir. 2005) (citing *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143
(9th Cir. 1994)).

18 “If the suit passes constitutional and statutory muster, the district court must also be
19 satisfied that entertaining the action is appropriate.” *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d
20 1220, 1223 (9th Cir. 1998). “This determination is discretionary, for the Declaratory Judgment
21 Act is ‘deliberately cast in terms of permissive, rather than mandatory, authority.’” *Id.* (quoting
22 *Public Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 250 (1952) (J. Reed, concurring)).

23 The court “must decide whether to exercise its jurisdiction by analyzing the factors set
24 out in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), and its progeny.” *Principal Life Ins.*
25 *Co.*, 394 F.3d at 669. These factors include: (1) avoiding needless determination of state laws;
26 (2) discouraging litigants from filing declaratory actions as a means of forum shopping; and (3)
27 avoiding duplicative litigation. *See, e.g., Principal Life Ins. Co.*, 394 F.3d at 672; *Gov’t*
28

1 *Employees Ins. Co.*, 133 F.3d at 1225; *Continental Casualty Co. v. Robsac Indus.*, 947 F.2d
2 1367, 1371–73 (9th Cir. 1991).

3 “When a party requests declaratory relief in federal court and a suit is pending in state
4 court presenting the same state law issues, there exists a presumption that the entire suit should
5 be heard in state court.” *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366–67 (9th Cir.
6 1991) (citing *Brillhart*, 316 U.S. at 495). This is particularly true when the only claim that the
7 plaintiff brings is under the Declaratory Judgment Act. *See Snodgrass v. Provident Life & Acc.*
8 *Ins. Co.*, 147 F.3d 1163, 1167-68 (9th Cir. 1998) (per curiam). In such cases, the court has a
9 compelling reason to let state courts resolve issues of state law. *See, e.g., Continental Casualty*
10 *Co.*, 947 F.2d at 1371 (“Moreover, this case involves insurance law, an area that Congress has
11 expressly left to the states through the McCarran-Ferguson Act. 15 U.S.C. §§ 1011–12
12 (1988).”).

13 Although plaintiff correctly notes that it has invoked diversity jurisdiction when filing the
14 instant case, diversity jurisdiction simply satisfies the first prong of this court’s analysis. The
15 court must determine whether it would be appropriate in light of the *Brillhart* factors to entertain
16 the instant action while the underlying state-court negligence case proceeds. This inquiry is
17 particularly necessary because “[w]here, as in the case before us, the sole basis of jurisdiction is
18 diversity of citizenship, the federal interest is at its nadir.” *Id.* at 1371.

19 Here, plaintiff argues that the *Brillhart* factors do not warrant dismissal because there is
20 no parallel state action, the underlying state-court action is not identical to the instant case, and
21 that plaintiff “is neither a party to the pending state action, nor is the state action centered around
22 [plaintiff]’s obligations pursuant to the [p]olicy.” (ECF No. 10 at 2). Plaintiff’s argument is
23 unavailing.

24 First, the court notes that this case—like the case in *Continental Casualty Co.*—involves
25 insurance law, “an area that Congress has expressly left to the states through the McCarran-
26 Ferguson Act. 15 U.S.C. §§ 1011–12 (1988).” 947 F.2d at 1371. Despite plaintiff’s contention
27 to the contrary, there is a parallel proceeding in state court: the negligence action regarding the
28 plaintiff’s insured’s car. Plaintiff suggests that the claims and parties must be entirely identical

1 in order for discretionary dismissal to be appropriate. But plaintiff's obligations under the policy
2 must be determined only because plaintiff is potentially liable to Simmons for damages sustained
3 in the underlying accident. Once again, *Continental Casualty Co.* is instructive. The Ninth
4 Circuit in *Continental Casualty Co.* held as follows:

5 Often an insurer has brought a declaratory judgment action in
6 federal court against its insured in order to obtain a ruling as to its
7 obligations in relation to a state court action by a third party
8 against the insured. Although the insurer would have been unable
9 to remove the state court action to federal court in most cases due
10 to lack of complete diversity under 28 U.S.C. § 1441(b), there was
11 diversity jurisdiction in the suit for declaratory relief because the
insurer and insured were citizens of different states. the ripeness
requirement of Article III's "case or controversy" clause precludes
the insurer's obtaining a declaratory judgment with respect to
its *liability* to the insured in such cases because "the federal relief
sought may hinge upon the outcome of state court actions."

12 *Id.* at 1371–72 (quoting *Ticor Title Ins. Co. of Cal. v. American Resources, Ltd.*, 859 F.2d 772,
13 777 n.7 (9th Cir. 1988)). Thus, the Ninth Circuit concluded that "[a] declaratory judgment action
14 by an insurance company against its insured during the pendency of a non-removable state court
15 action presenting the same issues of state law is an archetype of what we have termed 'reactive'
16 litigation." *Id.* at 1372.

17 Like in *Continental Casualty Co.*, plaintiff filed this action seeking declaratory judgment
18 on the basis of diversity—without asserting any other claims—when the underlying case could
19 not have been removed. Although plaintiff is not a party to the underlying case, a declaration of
20 plaintiff's obligations under the policy are best addressed by the state court action that will
21 determine liability for the underlying car accident. Plaintiff's tactical decision to litigate in a
22 federal forum by filing the instant suit is necessarily "reactive" litigation. Accordingly, dismissal
23 is warranted because there is a presumption in favor of the state court resolving issues of state
24 law.

25 Accordingly, Simmons's motion to dismiss is granted.

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1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Simmons's motion to
4 dismiss (ECF No. 7) be, and the same hereby is, GRANTED.

5 IT IS FURTHER ORDERED that plaintiff's declaratory judgment claim be, and the same
6 hereby is, DISMISSED.

7 The clerk is instructed to enter judgment and close the case accordingly.

8 DATED February 14, 2020.

9 
10 UNITED STATES DISTRICT JUDGE